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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of BARBARA J. and EARL  
R. HAGAMAN.

2d Civil No. B203391  
(Super. Ct. No. D04437)  
(Los Angeles County)

BARBARA J. FAIRBANK,

Respondent,

v.

EARL R. HAGAMAN,

Appellant.

Earl R. Hagaman (husband) and Barbara J. Hagaman (wife) were married on November 24, 1961, and separated on March 20, 1981. They obtained a judgment of dissolution in Los Angeles Superior Court and subsequently entered into an "interim" agreement to divide certain community assets, with another division to be made at a later date. That division never occurred.

In 1985, husband moved to New Zealand. Wife visited him and obtained monetary distributions in 1989 and 1993. She attempted to obtain additional funds in 1995 and 2005 but was unsuccessful. In 2006, in the long-dormant dissolution action, husband filed a motion to enter the interim agreement as a judgment. Wife moved the

court for an award of \$650,000 in attorney's fees and costs, pursuant to Family Code section 2030.<sup>1</sup> She contended that husband, without her knowledge, had removed \$25 million in community property assets from the United States in 1981. Wife sought fees to allow her to trace and recover these community assets. She argued that husband's wealth, her financial need, and the complexity of the litigation justified the award. The trial court granted her request. Husband alleges that the trial court abused its discretion by granting an award of this size. We affirm.

### FACTS

Wife filed a petition for dissolution on March 26, 1981, requesting that the court confirm to her an extensive list of assets. They included certain commercial property, real property, raw land, and community interests in the assets and goodwill of various corporations, partnerships and joint ventures. Wife also requested confirmation of deeds of trust, securities, bank accounts, pensions, life insurance and personal property. The trial court granted wife's petition for dissolution (status only) on May 21, 1982.

#### *Partial Distribution of Community Property*

On April 7, 1983, the Internal Revenue Service (IRS) served seven summonses upon husband, concerning his failure to pay income tax from 1980 to 1982 on profits earned in an oil brokerage business. On April 13, the parties entered into an Agreement of Interim and Partial Distribution of Community Property (the agreement). The agreement recited that the issues of community property division remained hotly contested. The parties indicated that they were nevertheless able to "effect this partial and interim distribution of some of the community property. In making this distribution, the parties have attempted and achieved, to the best of their knowledge and belief, an equal distribution of the property distributed herein." The parties acknowledged that they had been fully advised by separate counsel and accountants at all stages of the proceeding, and understood and agreed to the terms of the agreement.

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<sup>1</sup> All further statutory references are to the Family Code unless otherwise stated.

Under the agreement, husband agreed to pay wife's attorney's fees of \$110,000 for "services rendered to the date hereof and to be rendered to her in the future negotiations and investigations necessary to consum[m]ate the resolution of the remaining unresolved issues in the above-referenced dissolution of marriage proceeding[s]. It is agreed that, in the event that the contemplated future negotiations for the resolution of the remaining issues are terminated and become the subject of subsequent proceeding[s] or litigation, then [wife] and her counsel may apply to the court for additional fees and costs."

Included in the agreement was an additional attorney's fees provision that states: "In the event any action is ever brought to set aside this Agreement or any judgment embodying any of its terms, or to enforce any of the terms of this Agreement, or any judgment or decree embodying any of the terms of this Agreement, then the prevailing party in such action shall be entitled to receive from the other party reasonable attorneys' fees and costs incurred by him or her in bringing or defending said action."

In 1984, with the tax matters still unresolved, husband moved to New Zealand. In 1985, the IRS issued a Notice of Jeopardy Assessment claiming that husband owed taxes, penalties and interest from 1980 to 1982 in the amount of \$14,765,864.05. Husband has not paid his debt to the IRS and has never, to wife's knowledge, returned to the United States.

In 1989, wife and the parties' children visited husband in New Zealand. At their request, husband agreed to make additional monetary distributions to the family in 1989, 1993 and 1995. Husband did not make the final distribution. In early 1996, wife visited New Zealand and presented husband with a "Proposed Agreement of Full and Final Distribution of Community and Company Assets . . . ." The proposed agreement recited that, at the date of separation, the parties had community assets of at least \$15,160,509, and that wife was entitled to a one-half share, or \$7,580,254.50. She offered to settle the matter for \$6,319.875. Husband rejected her request.

On March 14, 2005, husband received a letter from wife's counsel in New Zealand, requesting payment of \$15,433,532.20 to wife. Husband again rejected wife's

request. On January 20, 2006, wife filed an action against husband in Christchurch, New Zealand, seeking recovery of community property. Husband argued that the matter should be heard instead in California.<sup>2</sup>

While the matter was pending in New Zealand, husband filed a substitution of attorney in the dissolution action in Los Angeles Superior Court. He moved to enter the interim agreement as a judgment pursuant to Code of Civil Procedure, section 664.6. In his accompanying declaration, husband alleged that he had signed the 1983 agreement on the advice of counsel, believing it to be a complete and final disposition relating to the division of property, support and custody.

The High Court of New Zealand subsequently dismissed wife's action on the grounds of *forum non conveniens*. The court concluded that California would be a more appropriate forum in which to adjudicate the dispute. The New Zealand court awarded costs to husband of NZ\$21,049.<sup>3</sup>

In 2006, husband filed a Declaration of Disclosure and Income and Expense Declaration (in Los Angeles Superior Court) but did not list his assets or liabilities. In the first document he indicated that he could not recall whether he had any liabilities because wife had stolen his records from the 1980's. In the second document he indicated that he had a gross income of \$10,000 per month. He attached a copy of his 1980 tax return and stated: "My recall is that my income for 1981, 1982 and 1983 was approximately the same." On February 7, 2007, the court conducted a hearing on

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<sup>2</sup> In his declaration submitted to the New Zealand court, husband indicated that he is married to his fifth wife and has three minor children. He explained that, since moving to New Zealand, he has "invested wisely in areas such as tourism that have experienced very good growth." He said: "I have taken risks and have turned the modest capital sum I received following my separation from [wife] into a far larger capital base. Many of the key assets involved are owned by trusts that I have established for the benefit of members of my family."

<sup>3</sup> Wife indicates in her reply brief that this sum is roughly equivalent to US\$12,437.27.

husband's motion and denied his request to enter the agreement as a judgment under Code of Civil Procedure section 664.6.

*Request for Attorney's Fees and Costs*

On June 7, 2007, wife filed an order to show cause (OSC) seeking pendente lite attorney's fees of \$500,000 and costs in the amount of \$150,000. Wife declared that, due to husband's vast wealth and his history of evading service, this sum was necessary to finance the very complex litigation. She alleged that, after their divorce, husband had surreptitiously transferred community property assets out of the country. Husband allegedly orally agreed to pay wife \$40,000 per year for 20 years or until they resolved their "property and IRS issues." Husband denies having made such a statement.

In her motion, wife listed an extensive number of assets that husband had allegedly not revealed and had never been divided. With the help of her forensic accountant, she made an initial determination that the value of the undivided assets in 1981 exceeded \$25 million.

According to her declaration, wife has paid \$81,000 to her counsel and owes in excess of \$30,000. She has paid \$65,202 to her forensic accountant and has an outstanding balance of \$26,330. She can no longer afford to pay attorney's fees and costs. Wife declared that she owns a condominium worth approximately \$575,000. She has social security income of \$730 per month and a bank account at World Savings with a balance of \$21,029.

Attached to wife's declaration was a photocopy of a webpage indicating that husband owns numerous hotel properties in New Zealand and has developed Scenic Circle Hotels. Based on an article in a business magazine, wife estimated husband's net worth was approximately \$112 million. She claimed that husband owns assets valued at \$126 million and lives in a home worth \$3.7 million.

Wife's counsel submitted a declaration estimating pretrial fees to range from \$600,000 to \$650,000 and costs to exceed \$300,000. He indicated that it would be necessary to determine the effect of the interim agreement and all assets and liabilities that existed on the date of separation. He would then need to trace and value all

community property from the date of separation to the present, an expenditure of \$70,000. Such an effort would require extensive discovery and travel to New Zealand. Discovery would range from \$125,000 to \$140,000 and evaluating husband's responses to discovery could run to \$145,000.

Wife's counsel expected that husband would have to be deposed in New Zealand, since he would likely be unwilling to return to the United States. Counsel stated it would be necessary to engage attorneys, accountants, real estate and business appraisers in New Zealand to establish the value of husband's interests, at an expense of \$200,000. The cost of the depositions alone could range from \$60,000 to \$150,000. Finally, there would be the expense of "interfacing" with forensic accounts of \$50,000 to \$60,000. Wife's forensic accountant submitted a declaration estimating that his research would require 200 to 300 hours, representing \$80,000 to \$120,000, plus staff charges of \$50,000 to \$75,000.

Several days before husband filed his responsive declaration, he deposed wife. In husband's opposition to the OSC, he argued that wife had failed to show that the fees were just or reasonable. He also claimed that the 1983 agreement contained an attorney's fee clause entitling the prevailing party to fees. Thus, the court could not award fees until a prevailing party was determined.

Husband filed another Income and Expense Declaration, stating that he is self-employed and has filed his tax returns in New Zealand. He included no information concerning his income, assets or deductions, writing only that they "are not applicable as [husband] acknowledges that he has the ability and is willing to pay any reasonable fees ordered."

### *Hearing on OSC*

In August 2007, the trial court conducted a hearing on wife's OSC. After hearing argument, the court addressed husband's counsel, stating: ". . . I'm not sure we have evidence of husband's assets. But he certainly said he can pay anything. And I think you wouldn't object too strongly if we assume yes, [his] assets have been probably 100 times what wife's assets are, somewhere in that area, it's probably a legitimate

guesstimate. Though I accept that there isn't hard evidence before the court." Husband's counsel stated that he did not know the value of husband's assets, "but I do know he has far greater ability [to pay] than she does, without question."

The court noted that, in 1981, an OSC in the dissolution action was heard by Judge Hogoboom, who was also unable to determine husband's income or assets and who characterized husband's testimony as "persistently evasive."<sup>4</sup> Relying on Judge Hogoboom's statement, the court stated that husband appears to have "a history of recalcitrance in this action and the court believes will continue to be recidivist and recalcitrant."

The trial court granted wife's request and ordered that \$100,000 in attorney's fees and \$25,000 in forensic accounting fees were payable immediately. The remainder was to be paid over the next five months, beginning September 15, 2007. All sums were to be paid to wife's counsel.

#### DISCUSSION

Husband argues that the trial court awarded the fees as a sanction against him and asserts that there was no basis for the court to assume he would be "recalcitrant" or "recidivist." He contends that it was unfair for the trial court to rely on a minute order issued in 1982 to impose sanctions. Husband suggests that the court should instead have awarded a "significantly smaller amount of fees" without prejudice to wife's right to seek additional fees. In the alternative, he argues the trial court could have implemented a case management plan. Husband emphasizes that wife has not paid the fees owed to him following dismissal of the New Zealand action. He claims it was not just or reasonable

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<sup>4</sup> In 1982, wife had filed an OSC on the issues of support and attorney's fees and costs. Judge William P. Hogoboom presided over the proceedings. In a minute order, dated December 20, Judge Hogoboom stated: "The exact amount of [husband's monthly earnings] cannot be determined because of the inconclusive financial declaration filed by [husband] herein and his persistently evasive testimony in cross examination thereon."

for the California court to award fees to wife while those owed to him from the New Zealand action remain unpaid.

Attorney's fees may be awarded as a sanction or based on a party's need and ability to pay. Section 271 permits attorney's fees to be awarded as sanctions for uncooperative conduct or conduct that increases litigation costs. (*Id.*, subd. (a).) Although husband's lack of cooperation has frustrated wife's ability to proceed, the award does not appear to have been issued as a sanction. Wife moved for the award under sections 2030 and 2032, which govern need-based awards. The court evaluated wife's request on the basis of financial need.

""California's public policy in favor of expeditious and final resolution of marital dissolution actions is best accomplished by providing at the outset of litigation, consistent with the financial circumstances of the parties, a parity between spouses in their ability to obtain effective legal representation." [Citation.]" (*In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866.)

Section 2030 provides: "In a proceeding for dissolution of marriage . . . and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party . . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." (*Id.*, subd. (a).)

The award of fees is determined by the incomes and needs of the parties and must be just and reasonable under their relative circumstances. (§ 2032, subd. (a).) Pendente lite attorneys fees and costs may be awarded for legal services rendered or costs incurred before or after commencement of the proceeding. (§ 2030, subd. (b).)

We review a trial court's award of fees for an abuse of discretion. (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 630.) Although the court possesses broad discretion in fashioning a pendente lite fee award, "its decision must reflect an exercise of discretion and a consideration of the appropriate factors. [Citation.]" (*In re*



*Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1219.) We will not overturn the trial court's order unless "considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citation.]" (*In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 296.)

The financial disparity between the parties is significant. Wife's income is limited to social security of \$730 per month. She owns a condominium with a fair market value of \$575,000 and has cash assets of \$21,029. To date, wife has incurred \$111,451.28 in attorney's fees and costs and \$65,202 for the services of her forensic accountant. Both wife's counsel and her forensic accountant submitted detailed declarations estimating the cost of discovery and the expenses of tracing husband's assets, all of which would need to be conducted in New Zealand. By contrast, husband presented no evidence to support his argument that the award was unreasonable.

At oral argument, wife's counsel noted that such a sizeable fee award would be unnecessary were husband willing to present the financial documents requested. His cooperation would eliminate the need for wife's counsel and forensic accountant to travel to New Zealand to obtain this evidence through other means.

Husband has continuously resisted disclosure of his income, debts and assets. His refusal to submit evidence to the trial court concerning his financial circumstances made the court's determination particularly difficult. He did not provide any evidence of his ability to pay, or indicate what he would consider to be a "reasonable" fee award.

The trial court appropriately considered the evidence before it: wife's income, the complexity of the litigation, and the cost of conducting discovery outside the country. It recognized that husband is a successful businessman of some stature in New Zealand, his stated willingness to pay fees and his counsel's acknowledgement that husband has a far greater ability to pay than wife. The award was just and reasonable under the relative circumstances of the parties and was necessary to place them on equal footing to maintain effective legal representation. There was no abuse of discretion.

The judgment (award of attorney's fees and costs) is affirmed. Costs on appeal are awarded to wife.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Michael P. Linfield, Judge  
Superior Court County of Los Angeles

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